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EXAMINER				
SAYALA, CHHAYA D				
ART UNIT		PAPER NUMBER		
1761				

DATE MAILED: 11/19/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/936,150

Applicant(s)

DIXON ET AL.

Examiner

C. SAYALA

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-27 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-27 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.  
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

1. Claims 1-10, 12-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brescia et al. (US Patent 5869121) in view of Clausen (US Patent 4039692), GB 2237497 and Martin et al. (US Patent 4781939).

Brescia et al. teach a fried pet food made from protein (col. 2, lines 30+) and starch (col. 2, lines 39+) in a thermally gelable mixture (col. 2, lines 23 and 47) which also contains preservatives (col. 4, line 27). The thermally gelable matrix is formed into pieces that are fried. At col. 3, lines 3-15 the reference teaches that the gellable mixture is fed into an emulsion mill. Col. 3, lines 28-30 teaches ejecting the heated mixture from the mill into a holding tube. The moisture content in the final product is less than about 20% by weight (col. 3, last line). The reference teaches that the fried product is packed into suitable packaging (col. 4, lines 32-3).

The reference does not teach the moisture content as claimed, which is, at least about 25% by weight. This reference also does not teach the particular packaging method claimed, a pouch or a retortable, sealed container.

Clausen also teaches a fried pet food which contains protein and flours of farinaceous material such as wheat, corn, etc. (col. 2). The ingredients included are gums, gelatins, etc. Col. 3, lines 10-12. The invention includes the embodiment of

adding water to the mixture if necessary, so that the moisture content of the fried product is between 35-60 wt%, and preferably 35-45% (see col. 4, lines 25-40). The pH of the product is said to be typically, between 5.5 to 8.0 (col. 4, lines 25-40).

GB 2237497 teaches a pet food that is a mixture of protein and cereals which would naturally include starch, preservatives and deep-frying the mixture. Pages 1-2. The product is flash-fried (see page 4) and packed in a sealed pouch (col. 2, alst 2 lines). See also claims 1, 3-4, 6-7. Note that the patent teaches the benefits of deep-frying at page 2, lines 1-5, namely, it develops meaty flavors and improves palatability and pasteurizes the product.

Martin et al. teach a meat emulsion, heating the emulsion, coagulating to form a firm emulsion mass and injecting steam under pressure into said meat emulsion to facilitate layering of the meat emulsion and forming discrete pieces having a plurality of distinct layers bonded together. The meat is then subjected to canning and retorting procedures. See col. 8, lines 40-68.

It would have been obvious to one of ordinary skill in the art to add the water content shown in Clausen to the mixture of Brescia et al., because of the similarities of the inventions being drawn to similar products as described above and because it is well known that the palatability and acceptability of a pet food product with a greater content of moisture is better than one which is dry or has a low moisture content. Pet food products on the market are typically packaged in pouches or cans and to use the methods of the GB patent or Martin et al patent and package the pet food of Brescia et al. in a pouch or in a can would have been an obvious choice. Furthermore, Martin et

al teach that retorting cans in commercial canning procedures for pet foods was known in the art at the time the invention was made and this would have been obvious to one of ordinary skill in the art. See col. 1, line 50, col. 8.

2. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Brescia et al. (US Patent 5869121) in view of Clausen (US Patent 4039692), GB 2237497 and Martin et al. (US Patent 4781939) and further in view of Koschak et al. (US Patent 5004624) or Burkwall, Jr. et al. (US Patent 4191783) or Bartsch (US Patent 4011345).

The primary references are as described as above. They do not show the pH of the food mixture. Koschak et al. teach a semi-moist pet food that is stabilized by using acidulants to maintain a pH less than 4.7. See col. 2. Burkwall, Jr. et al teach stabilizing pet food by using an acidic compound to maintain the pH between 4 and 6.8. See claim 1 and claim 20. Bartsch teaches a semi-moist pet food that has a moisture content between 15-50% and an acid content that lowers the range of the pH to between 4.2 to 5.9 to provide stability to the pet food. See col. 4, lines 44-68 and claims 1-6. It would have been obvious to one of ordinary skill in the art at the time the invention was made to add an acid to maintain the pH between 4.5 and 5.2 so that the pet food of Brescia et al. which only has a moisture content of 5-16% that has been modified to be semi-moist so that the palatability and acceptability are improved, could be stabilized by such addition to keep the pH in the range 4.5-5.0. Note that '783 states at col. 3, lines 49-53 that by such a modification not only is the desired moisture level

achieved so that the palatability and texture are improved, but at the same time, the semi-moist quality and microbiological stability are maintained.

### ***Response to Arguments***

Applicant's arguments filed 10/02/2003 have been fully considered but they are not persuasive.

At page 3, applicant faults the rejection made under 35 USC 103, because Brescia fails to disclose the moisture content of at least about 25% by weight. Brescia, applicant states, relates to a moisture reduced food product that has a moisture content of less than 20% by weight. Therefore, he contends that Brescia teaches away from the claimed invention.

First, this rejection is not under 35 USC 102, but 35 USC 103, and therefore, it is not necessary that each and every limitation be disclosed by Brescia et al. Second, it is well established that one of ordinary skill in the art is held accountable not only for the specific teachings of references, but also for the inferences which those skilled in the art may reasonably be expected to draw. In re Hoeschele, 160 USPQ 809, 811, (CCPA 1969). In considering the disclosure of a reference, it is proper to take into account not only specific teaching of the reference but also the inferences which one skilled in the art would reasonably expected to draw therefrom. See In re Marco Preda, 159 USPQ 342, and Simmons Fastener Corp. v Illinois Tool Works, Inc., 218 USPQ 547-548, 558. Furthermore, there are three possible sources for a motivation to combine references:

the nature of the problem to be solved, the teachings of the prior art, and the knowledge of persons of ordinary skill in the art, In re Rouffet, 47 USPQ2d 1453, 1457-58 (Fed. Cir. 1998). In fact, Brescia et al teaches all the limitations except the moisture content of at least about 25%. The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

Clausen expressly teaches the following:

In summary, Clausen teaches that 1) intermediate moisture or soft moisture animal foods are successful,  
2) deep fat frying while having some known advantages, produces significant dehydration, and  
3) Clausen teaches that deep frying condition can be regulated to minimize dehydration. Clausen teaches adding H<sub>2</sub>O if necessary so that the moisture of the deep fried product is between 35 – 45%. This is done by regulating the emersion time to an excess of 2 minutes. For instance, at col. 3, lines 30-54, the patentee states:

"According to this invention, it has been found that to effect the desired degree of cooking, it is necessary to subject the final product to a deep fat frying process in which product temperatures above 140.degree. F. and preferably between 150.degree. and 250.degree. F. are achieved. The actual cooking time depends upon the size, shape, and weight of the meat piece as well as the temperatures employed in the deep fat frying medium. For example, 15 grams of an intermediate-moisture animal food piece in the form of a meatball having a 3/4 inch diameter will reach a temperature of about 150.degree. F. after about 3 minutes in 300.degree. F. oil. In general, however, process

times of less than 1 minute and preferably 1 1/2 to 2 minutes are not satisfactory for achieving the requisite degree of cook unless extremely high fat or oil temperatures are used which may in turn be detrimental to the intermediate-moisture food. Conversely, cooking to such product temperatures in excess of, say 4 to 5 minutes may detract from the palatability of the product and, importantly, to effect a degree of dehydration in significant amounts to alter the stability criteria achieved prior to cooking; and, to effect a significant enough replacement of the water or water soluble solutes with the fat or oil of the deep frying process to alter the stability system."

Clausen, therefore provides the motivation to modify Brescia et al as to its moisture content, which is the preferred product because it is well known that pets prefer moisture in their foods and these products enjoy success in the market (see Clausen, col. 1, lines 8-11), and provides the guidance and teaching to actually modify it. Clausen is a secondary reference that modifies and provides reasons and motivation to the modification of the primary reference. Therefore, applicant's remarks at page 4, that Clausen does not relate to a thermally gelled matrix, are untenable. Whether Clausen teaches a gelled matrix or not, Clausen teaches the method necessary to control temperature and time of frying and correspondingly the amount of moisture to maintain the moisture of a deep fried product and this would apply to the product of Brescia et al. as well, which is deep fried.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See **MPEP § 706.07(a)**. Applicant is reminded of the extension of time policy as set forth in **37 CFR 1.136(a)**.

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to **37 CFR 1.136(a)** will be calculated from the mailing date of the



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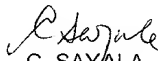
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advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. SAYALA at Group 1761, telephone number (703) 308-3035.

The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3599.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is 703-308-0661.

  
C. SAYALA  
Primary Examiner  
Group 1700.